United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

74-2459

To be argued by
JULIA P. HEIT

B
P1S.

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

LUIS OTERO,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA, :

APPELLEE, :

DOCKET NO.:

-against- : 74/2459

LUIS OTERO, :

DEFENDANT-APPELLANT. :

----------x

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered August 16, 1974 in the United States District Court for the Southern District of New York (Frankel, J.) convicting appellant after a jury trial of possession with intent to distribute and the distribution of narcotics in violation of Title 21 U.S.C. Section 812. 841 (a)(1), 841 (b)(1)(A) and sentencing him to two years imprisonment and special parole for three years.

Appellant is presently free on bail pending the determination of this appeal.

QUESTION PRESENTED

WHETHER THE INDICTMENT SHOULD BE DISMISSED SINCE THE EIGHT MONTHS DELAY BETWEEN THE DATE OF THE ALLEGED CRIME AND APPELLANT'S ARREST PREVENTED HIM FROM EFFECTIVELY PREPARING HIS DEFENSE.

STATEMENT OF FACTS

Appellant was charged in a one-count indictment with possession with the intent to distribute and the distribution of 118 grams of heroin.*

In a motion dated August 21, 1973, appellant, inter alia, moved to dismiss the indictment on the ground that the delay of seven months between the alleged crime and his arrest had irreparably prejudiced his ability to prepare a defense. Appellant maintained that it was unreasonable to expect any person to recall his whereabouts at a given time on a given date seven months before, much less ask possible outside witnesses to do so. Alternatively, appellant requested a hearing. (A.6-9)

In opposition to appellant's motion, the Government pointed out that the charges against appellant emanated from an incident occuring on November 28, 1973 and that the complaint and arrest warrant had been issued on June 18, 1973. Appellant was thereafter arrested on July 23, 1973. The Government contended that appellant was merely speculating that his recollections may be impaired by the seven months delay between the incident and the arrest. According to the Government, the Supreme Court in United States v. Marion, 404 U.S. 307 (1971)

---

* The indictment is set forth in the Appendix, A 4 Numbers preceded by the prefix "A" refer to the pages of the Appendix.

required that in cases of this nature, the defendant must establish actual prejudice. (A. 14-16)

In reply, appellant stated that it was unreasonable to expect either him or a witness to recollect his whereabouts on that particular date and that in any event, the issue should be explored at a full hearing. (A. 10-13)

The Court summarily denied appellant's motion without opinion. (Frankel, J.)

In another motion dated March 13, 1974, appellant again moved to dismiss the indictment on the ground that the pre-indictment delay had prejudiced his ability to prepare a defense. Appellant pointed out that his first trial ended in a mistrial on March 4, 1974. At that trial, the Government through their witness attempted to show an alleged sale of heroin with appellant acting as the seller on November 28, 1972. Another sale was attempted on February 21, 1973 but this attempt failed. Appellant claimed that even assuming the truth of these allegations, the Government did nothing further to either "set" him up or arrest him and he was not in fact arrested until July of 1973, eight months after the alleged incident. According to appellant, because of the nature of his employment in November of 1972, there were no records to show his whereabouts at this critical time nor can he or anyone who might be of assistance recall this specific date. (A. 17-20)

On March 25, 1974, the Court again summarily denied this motion. (Frankel, J.)

GOVERNMENT'S CASE

SPECIAL AGENT MICHAEL GRAY testified that on November 28, 1972 while at his office, he received a telephone call from Raymond Torres who acted as a confidential informant for their bureau. As a result of this telephone conversation, he took $4,500 and arranged for a surveillance at 183rd Street at St. Nicholas Avenue in New York. (24)* He and his partner then met Torres at 181 Street and Broadway where Torres was subjected to a search to determine if he was carrying any contraband. Finding no contraband on his person, they all drove to 170th Street and Grand Concourse where Torres got out of the car and met with a man whom the Agent identified as appellant. (25-26) Torres conversed with appellant for a few minutes and returned to the car. From that location, they drove to 22 Elliot Place which was three or four blocks away. (28) Upon arriving there, Torres again got out of the car and the Agents observed appellant hand Torres a brown paper bag. (28) This bag was subsequently found to contain 1/8 kilo of heroin. (29) Accordingly, the Agents drove back to 170th Street and Grand Concourse. There Agent Gray gave Torres a brown paper bag containing the money which Torres in turn gave to appellant. (31)

* Numerical references are to the pages of the trial transcript.

The next day Torres surrendered the $200 which was allegedly given to him by appellant for bringing the heroin customer. (32)

Agent Gray explained that appellant was not arrested until July 21, 1973 because they wanted to use Torres in other cases and in addition, they intended to try to purchase more drugs from appellant. (91)

Before February 21, 1972, he had arranged to have lunch with appellant but appellant refused to meet with him. (96) Agent Nieves, who was Puerto Rican as was appellant, did meet with him on February 27th but appellant refused to discuss narcotics with Nieves. (100-01)

Agent Gray denied deliberately delaying the arrest so that it would be more difficult for appellant to prove where he was on a given day at a given time. (151)

AGENT ROBERT NIEVES testified that on February 22nd, Torres introduced him to appellant as the customer who had brought the previous package. (177) Appellant asked Torres if the man could be trusted and Torres replied that he had had prior dealings with him. Appellant then replied "We don't talk about things like this in front of people I don't know". (178) The rest of the conversation related to the Agent's buying a cadillac which appellant wanted to sell. Appellant told the Agent that he wanted to sell the car because he needed the money to enter the ice cream business. According to the Agent, no other effort was made to meet appellant after February 22nd. (189)

DEFENSE

Because Raymond Torres was unavailable to testify at the trial, appellant chose to introduce into evidence his testimony from the prior trial.

RAYMOND TORRES had previously testified that he had been arrested by Special Agent Gray in November of 1972. (P.8)* This arrest was predicated upon an outstanding indictment in Puerto Rico which charged him with the sale of 23 grams of heroin. (P.8) Because of these charges, he agreed to co-operate with the Government. (P.9)

According to Torres, he was a manager for the Vesuvio Bar on 184th Street and St. Nicholas Avenue in Manhattan. (P.10) He identified appellant as the man whom he knew for the past few years as "Izzy". (P.10) A week after he had been arrested, he met with Izzy in the bar and asked him if he could supply a kilo of heroin as he had an interested customer who was Agent Gray. (P.12) Appellant stated that he could get the heroin for him and the next day, it was agreed that he would sell 1/8 of a kilo to Torres. (P.14) Appellant then telephoned his supplier whose name was Ruben. (P.15) After this call, appellant informed Torres that the deal would take place at 6:30 p.m. at 170th Street and Grand Concourse and the price would be $4,500.(P.17-18)

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* Numerical references preceded by the prefix "P" refer to the pages of the trial transcript dated February 25, 1974.

Thereafter, Torres met Agent Gray at 181st Street and Broadway where he was searched. (P.18-19) They then proceeded to the designated location where Torres met appellant and asked for the merchandise. However, appellant told him that as he was 15 or 20 minutes late, he'd have to get the heroin. (P.22-23) Appellant directed Torres to go to 22 Elliot Place and at this location appellant handed him a brown paper bag which he in turn gave to Agent Gray. (P.24) Agent Gray then gave Torres the money to give to appellant and the next day appellant gave him $250, $200 of which Torres gave to the Agent. (P.27)

Torres had further testified that in February he had introduced Agent Nieves to appellant and had held Nieves out as the heroin customer. (P.29) Appellant asked if he could trust this guy and Torres responded that he could. (P.31)

Torres denied knowing that appellant used to go out with his wife before they were married. (P.132)

APPELLANT, 28 years of age, denied ever selling narcotics to anyone. (208) He maintained that he worked with his brother, Carlos Otero, who was involved in various businesses. (211-212)

Appellant stated that he has known Torres for several years and used to go out with his wife before Torres met her. (213-214) According to appellant, whenever Torres would drink, he became very jealous of this and would get very angry. (214)

Appellant could not remember where he was on November 28, 1972 at 8:30 p.m. (217) He insisted, however, that he never had anything to do with narcotics. (219)

ARGUMENT

POINT I

SINCE THE EIGHT MONTHS DELAY BETWEEN THE DATE OF THE ALLEGED CRIME AND APPELLANT'S ARREST PREVENTED HIM FROM EFFECTIVELY PREPARING HIS DEFENSE, THE INDICTMENT SHOULD BE DISMISSED.

In this case, the sole charge against appellant was his alleged involvement in a sale of narcotics occurring on a specific date and at a specific time. Consistently maintaining his innocence of this charge, it was crucial to the preparation of his defense that he either remember his whereabouts at that particular time, or that he produce some witness who could verify his whereabouts. Although the crime allegedly occurred in November of 1972, appellant was not arrested until July of 1973. As the Government failed to offer any plausible explanation for this undue delay in arresting appellant, it must be found that the eight months delay precluded appellant from effectively preparing his defense. Accordingly, his conviction should be reversed and the indictment dismissed.

It is entirely unreasonable to expect that any person, let alone a defendant who is confronted with such a serious accusation against him, can remember his whereabouts at a specific time many months before. This is especially true if nothing momentous has happened to him that would implant that date in his mind.

However, this is precisely what happened to appellant. Although he denied ever selling narcotics to anyone, he simply could not verify his whereabouts on the date of the alleged sale which occurred eight months before his arrest. While he was gainfully employed during this time period, his place of employment did not keep records to verify his whereabouts at that time. Likewise, if appellant could not remember his whereabouts at this critical time, it would be absurd to expect any other witness to remember.

To state that under these circumstances, a defendant is not prejudiced in his ability to effectively prepare his defense when his arrest is intentionally delayed by Government officials is an indulgence in pure fiction.

Furthermore, it cannot be said that the fact that the delay between the charges and the arrest encompassed only eight months mitigates the prejudice. The United States Supreme Court in United States v. Marion, 404 U.S. 307 (1971) specifically stated:

> However, we need not, and could not now, determine when and in what circumstances, actual prejudice resulting from a pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and the most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case 404 U.S. at pp.324-35

Thus, even a comparably short delay can result in actual prejudice to a defendant and that is what occurred in the present case.

The cases decided by this Court which bear on this issue are readily distinguished from the present case.

In United States v. Capaldo, 402 F.2d 821 (2d Cir., 1968), this Court found that the 40 months delay in obtaining the indictment did not prejudice the defendant because no witnesses were lost, the defendant was able to give a coherent account of his version of the events on the day of the crime, the defendant had been interviewed by the police shortly after the commission of the crime so that he was able to fix the day in his mind, and finally, he had the benefit of the teller's testimony. However, all the factors specified in Capaldo are conspicuously absent in this case.

In United States v. Parrott, 425 F.2d 972 (2d Cir., 1970), this Court found that the defendant himself was in part responsible for the pre-indictment delay, that the case was a complex one requiring extensive time for investigation, and that the case was predicated upon documentary evidence. In the present case, it cannot be claimed that appellant was in any way responsible for the delay in his arrest, and certainly, the alleged sale of narcotics is a crime which is a relatively simple case to prepare and present. And, of course, the Government's case is dependent upon the testimony of witnesses rather than existing documentary evidence.

And in United States v. Feinberg, 383 F.2d 60 (2d Cir., 1967), although there was a five year delay in prosecuting the offense, this Court found that no prejudice inured to the defendant because defendant was able to point only to isolated instances of diminished recall, he testified with specificity as to the events in question, and he was placed on notice one week after the alleged crime that he would be called to answer for his alleged participation in the alleged offense. Again, in this case, appellant had absolutely no recollection of the day of the alleged crime and at no time was he put on notice that he would have to defend himself on charges originating on the date. See also United States v. De Masi, 445 F.2d 251 (2d Cir., 1971)

But even more important, the Government offered no valid reason for delaying appellant's arrest and in the absence of such reason, the delay in this case must be deemed intentional. First, the Government summarily claimed that Torres had been working with them on other cases and that they did not want to reveal his cover. The Government offered no factual basis to support this conclusion. At the time of appellant's motion, Torres' identity had already been revealed so it would have been an easy matter for the Government to have set forth the other cases in which Torres had allegedly been involved. In this regard, it must be pointed out that appellant requested a hearing and it is only at such a hearing could the truthfulness

of the Government's position be fairly determined. The Government also alleged that they delayed arresting appellant because they intended to try and engage him in other sales. Yet, the record in this case belies the Government's claim. After February 22nd, of 1973, no effort whatever was made to engage appellant in another transaction. Hence, no valid reason remains for the Government's failure to arrest appellant promptly.

Hence, considering all the facts and circumstances of this case, it must be found that the unexcused eight months delay between the alleged crime and arrest precluded appellant from effectively preparing his defense and now mandates the dismissal of the indictment against him.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

February , 1973.

RESPECTFULLY SUBMITTED,

ROBERT BLOOM
Attorney for Defendant-
Appellant
351 Broadway
New York, New York 10013

JULIA P. HEIT
OF COUNSEL

APPENDIX
DOCKET SHEETS

A1

CRIMINAL DOCKET
ITED STATES DISTRICT COURT

JUDGE FRANKEL

73CRIM. 744.

C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: Shirah Neiman
vs.	264-6419
LUIS NORBERTO OTERO	
	For Defendant:

7 STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed ✓	Marshal					
Violation	Docket fee					
Title 21 Sect 812 & 841						
Sec.						
Dist. of Heroin and posses.						
with intent to dist.						
ONE COUNT						

DATE	PROCEEDINGS
7-31-73	Filed Indictment.
8-13-73	Deft(atty present)pleads not guilty, Case assigned to Judge Bauman Bail of $10,000 PRB by $1,000 previously fixed by Magistrate cont'd ~~Order~~ ordered fingerprinted & photographed. 10 days for motionss Wyatt,J.
8-23-73	Filed defts. notice of motion dismissing indictment.
9-18-73	Filed notice of appearance by Robert Bloom, 350 B'Way, N.YC. CA 6-1045.
9-21-73	Filed B/P.
9-21-73	Filed affdvt. of James E. Nesland in response to pending motions of deft. LUIS OTERO.
9-21-73	Filed Govt's. memo of law in opposition to deft. pre-trial motions.

PROCEEDINGS

Filed affirmation of Robert Bloom dtd. 10-1-73

Filed memorandum opinion #39934 Upon reading the papers and hearing counsel the dispose of defts motion dtd.8-21-73 as follows.***Deft will be informed as to amt.of money involved***the Govt.will disclose the name of its informant Etc. the remaining items of defts motion are denied.....Frankel, J. Mailed notice.

Filed Govt's notice of Readiness for trial.

12-7-73 Filed affdvt. of James E.Nesland,AUSA pursuant to memorandum order of Oct.18-73..

Filed stip that trial be adjourned to Feb.25-74....Frankel,J.

Trial by JURY commenced - atty.present.

Trial cont'd. interpreter sworn.

Trial cont'd.

Trial cont'd.

Trial cont'd.

Trial cont'd - JURY unable to reach verdict. MISTRIAL declared. ~~Dft~~ Deft.is continued on present bail.....Frankel, J.

Filed affdvt. & notice of motion to dismiss the indictment, for return of automobile.

Filed memorandum***The application for dismissal of the indictment for pre-indictment delay is denied...the case is set for June 17-74 at 10 a.m.....Frankel, J.

Filed order****the court now orders that the two indictments be consolidated for trial.....Frankel, J.....Mailed notice.

Trial by JURY commenced - atty.present.

Trial cont'd.

Trial cont'd.

Trial cont'd & concluded..Jury returns verdict of Guilty..P.S.I. ordered. Sent.date Aug.9-74 Deft released on $50,000 P.R.B. to be signed by his brother and sister by the close of buisness on June 28,1974....Frankel, J.

Filed transcript of record of proceedings dated 2-25-74.

Filed Personal Recognizance Bond with ~~out~~ security in the sum of $50,000 on deft. Luis Norbe Otero. Conditions of said bond have not been fully complied with. Bond called for the s of defendant's sister, but, as of August 5-74, she has not signed bond. U.S. Attorney's Office, via Thomas E. Engel, has been notified of this situation.

Filed sentencing Exhibit #1 Ordered sealed ...But NOT TO BE PLACED IN VAULT...Frankel,J. Sent. adj'd until 3:30pm 8-16-74 Deft cont'd on present bail.

Filed P.R.B. in amt.of $50,000.

(Cont'd ...)

PROCEEDINGS

	iled Judgment(Atty.Robert Bloom,present)the deft is committed for imprisonment or a period of TWO YEARS....Pursuant to the provisions of Section 841 of .21, U.S.Code, deft is placed on SPECIAL PAROLE for a period of THREE YEARS in addition to said term of imprisonment to commence upon release from confinement.....Frankel, J.....Ent.on docket Aug.20-74.....
8-26-74	Filed order that the deft is authorized to appeal in forma pauperis***Frankel,J. (Mailed notice to atty.)
8-26-74	Filed notice of appeal from Judgment of Aug. 16,1974..Copy sent to U.S.Atty. & Atty.for deft 351 B'Way NYC
9-16-74	FILED COPY OF JUDGMENT & CONVICTION

A...
...Clerk

By ... Deputy Clerk

:ilf
73-1594

INDICTMENT

A4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73CRIM. 744

UNITED STATES OF AMERICA :

-v- :

LUIS NORBERTO OTERO, a/k/a "Izzy" :

Defendant :

INDICTMENT

73 Cr.

The Grand Jury charges:

On or about the 28th day of November, 1972, in the Southern District of New York, LUIS NORBERTO OTERO, a/k/a "Izzy", the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 118 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Barbara Allyn
FOREMAN (Deputy)

Paul J. Curran
PAUL J. CURRAN
United States Attorney

JUDGMENT

JUDGMENT AND COMMITMENT (Rev. 2-68)

ENGEL, AUSA

ONLY COPY AVAILABLE

A5

U.S. DISTRICT COURT
FILED
SEP 16 1974
S.D. OF N.Y.

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

No. 73 CR 744

LUIS NORBERTO OTERO

On this 16th day of August, 1974 came the attorney for the government and the defendant appeared in person and[1] by Robert Bloom, Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, intentionally and knowingly distributing and possessing with intent to distribute a Schedule I narcotic drug controlled substance, to wit, heroin hydrochloride. (Title 21, U.S. Code, Sections 812, 841(a)(1) and 841(b)(1)(A).),

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] TWO (2) YEARS.

Pursuant to the provisions of Section 841 of Title 21, U.S. Code, defendant is placed on Special Parole for a period of THREE (3) YEARS in addition to said term of imprisonment to commence upon release from confinement.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MARVIN E. FRANKEL,
United States District Judge.

The Court recommends commitment to[6]

RAYMOND F. BURGHARDT,
Clerk.

A True Copy. Certified this 16th day of August, 1974

(*Signed*) Raymond F. Burghardt *Clerk.* (By) E. Svanciger *Deputy Clerk.*

13-14 Stay

FPI-MI—5-3-74-1.1 M-2174

APPELLANT'S MOTION DATED AUGUST 23, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

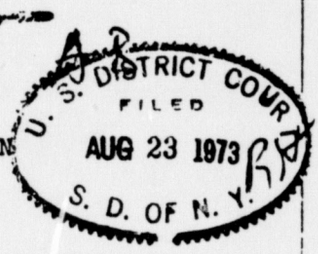
UNITED STATES OF AMERICA

-v-

LUIS OTERO,
Defendant

73 Cr. 744

NOTICE OF MOTION



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SIR:

PLEASE TAKE NOTICE that the undersigned, upon all the proceedings heretofore had herein, will move this Court, on the 12th day of September 1973, at 9:30 o'clock AM, or as soon thereafter as counsel can be heard, at the United States Courthouse, in room 305 thereof, for an order:

1) Directing disclosure as to the time and place of the alleged crime herein, the "third person" allegedly involved in the alleged transaction, the quantity of heroin and money allegedly involved, the results of any scientific tests performed herein, the content of any statements made by the defendant when arrested or thereafter, an inventory of the property seized from or found in the possession of the defendant upon arrest;

2) Dismissing the indictment on the ground that the grand jury is not representative of the community in that it excludes young people, Black people, Hispanic people, and poor people to the prejudice of the defendant by a systematic method of selection; In the alternative, an evidentiary hearing should be held on this question;

3) Dismissing the indictment on the ground that a delay of seven months in accusing the defendant of a crime has irreparably prejudiced his ability to prepare a defense. It is unreasonable to expect that any person can himself recall his whereabouts at a given time on a given date seven months previous, much less ask any possible outside witness to do so; In the alternative, an evidentiary hearing should be held on this issue;

4) Directing that the Government return the automobile of the defendant, which automobile was seized upon arrest;

5) Directing that the government forthwith disclose the entire criminal record of any prospective prosecution witness;

6) Directing that the Government disclose any exculpatory evidence;

7) Directing that the Government disclose whether there was any electronic eavesdropping involved in this case as to the defendant and/or his associates and friends;

8) Directing that the Government search to discover whether counsel for the defendant (undersigned) has been overheard by any government agency by means of any lawful or unlawful electronic eavesdropping:

9)Directing that the government disclose any previous identification of the defendant by anyone, and the method and circumstances of said identification;

10) Suppressing any identification, statements, and physical evidence seized;

and for such further relief as may seem proper.

New York, New York
August 21, 1973

Yours, etc.

Robert Bloom
Attorney for Defendant
350 Broadway
New York, New York 10013

212-233-3300

To: Hon. Paul Curran
United States Attorney
SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

-v-

LUIS OTERO,
Defendant

- - - - - - - - - - - - - - - - - -x

ROBERT BLOOM, an attorney at law, hereby affirms:

I am the attorney for the defendant herein and I make the instant affirmation in support of the attached Notice of Motion.

1) The various items of disclosure requested are necessary for the preparation of the defense, and are required to be disclosed by the FRCP.

2) It has been the common and constant experience of those who have had the opportunity to note the composition of federal grand juries that said juries are virtually always grossly underrepresented as to Black, Hispanic, young, and poor people. It is submitted that this Court has a duty to inquire into the fact of said composition and the reasons therefor. The law prohibits deliberate, systematic exclusion of any legally cognizable group. Not having been inside the grand jury room, there is, of course, no way for me to assert that this particular grand jury was not balanced, but it is submitted that any case in which the Courts of this country have ruled upon jury composition has begun by a trial judge inquiring into the underlying facts.

3) A delay of seven months in informing the defendant that his whereabouts on November 28, 1972 are significant is a clear deprivation of due process. To expect one to recollect without the assistance of daily reports is unreasonable. But even more unreasonable is the expectation that an "alibi" witness, for example, might remember the defendant's whereabouts. There is a growing number of New York State cases that recognizes this problem and such cases at least require a hearing to show prejudice and good cause, if any, for the delay.

4) When the defendant was arrested, his automobile was seized. He was not found with any narcotics. The seizure was improper. He needs the car for business and personal use. It should be returned to him.

5) It is essential that the criminal record, if any, of any prospective government witness be known now, so that his or her background may be properly investigated. Disclosure on the eve of trial is tantamount to non-disclosure because of the work required for thorough investigation.

6) The requirement of disclosure of exculpatory evidence after a diligent search needs no argument.

7) Electronic eavesdropping of the defendant and/or any overhearing of the defendant must be disclosed after a diligent search.

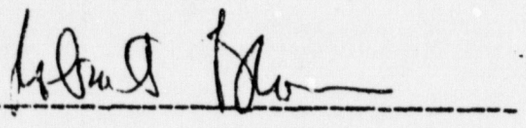
8) An unfortunate era in American history has led to the public disclosure of the fact of widespread eavesdropping, lawful and otherwise, of a number of people. As it happens, your affiant is the attorney for a number of alleged militant individuals who may well have been "bugged" in recent years and months. In fact, I know that I have been overheard under a court-ordered wiretap in Kings County (Supreme Court of the State of New York). It is the duty of the government to make a diligent search to discover whether counsel for the defendant has been overheard, either under a court-ordered tap or a White House, "National Security" tap, or otherwise, and to disclose any positive results of that search.

9) Defendant must know the circumstances of any prior identification of him by any individual, if such is the case, so that he may properly prepare his defense. The defense of a criminal case should not be a guessing game. Too much is at stake.

10) Defendant requests suppression of any improperly seized evidence, the extent of which seizure, if any, is not yet known.

WHEREFORE, your affiant requests the relief sought.

New York, New York
August 21, 1973



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

73 Cr. 744

LUIS OTERO,
Defendant

ROBERT BLOOM, an attorney at law, hereby affirms:

I am the attorney for the Defendant herein, LUIS OTERO.

I make this supplementary affirmation in support of an omnibus motion filed and served August 23, 1973. I find it necessary to submit this supplementary affirmation because the matter was first assigned to Judge Bauman, who indicated that he would expect oral argument in support of the motion. Therefore, my original supporting affirmation omitted material I expected to discuss orally.

On September 2[illegible] 1973, at 9:30 AM, I discussed resolution of certain aspects of the motion with the Assistant United States Attorney assigned to this matter, James Nesland, Esq., in his office, and we were able to resolve some of the issues, as indicated below.

As to motion number

1) Time and place of alleged crime, quantity of heroin, scientific tests, statements of accused, and inventory of property seized are mutually resolved by agreement or otherwise.

As to the identity of the "third person" referred to in the complaint herein, I am told that he or she is an "informant" and that the government opposes disclosure. Such information is material and necessary to the defense of this matter. The government cites the case of Roviaro v United States, 353 US. 53 in its memorandum of law. In that case the Court held that it was error not to disclose the identity of the informant in a case where the informant was not the alleged buyer of the narcotics (herein he is alleged in the complaint to be the buyer). The Court indicated that where the potential testimony of the informant would be highly material to the alleged facts, disclosure is required.

The government further cites United States v Russ 362 F. 2d 843 (2d Cir. 1966). In that case, the Court held that it was not error to prohibit

disclosure because the informant wandered away from the agent (to whom the sale was made) after the introduction of the defendant to the agent and was not in any way a witness who could shed any light on the details of the transaction. Herein, by contrast, it is alleged, according to the complaint, that the alleged sale was made to the informant. Obviously, the testimony of this person would be material as to the issues of identity and/or entrapment, or any other factual issue. To quote the Court, a trial "is not a sporting event", and the withholding of such material information would be highly prejudicial to the defendant. An investigation into the background of said person should be initiated immediately on behalf of the defendant.

As to the request for information as to how much currency was exchanged, if said information were available, I could explore the reasonableness of the alleged transaction with those knowledgable in the area.

2) As to the composition of the Grand Jury, there is no way for me to allege that there is any systematic exclusion unless I am informed by way of an evidentiary hearing as to the methods prescribed and the methods actually employed by those entrusted with summoning jurors for service. The service of subpoena and the information supplied thereunder would not shed light upon the essential questions raised by a challenge to the Grand Jury composition. One way or another, fair-minded people must know that whatever the cause of imbalance and underrepresentation, it is a fact that certain groups are underrepresented and that the Courts have the power and the duty to alter that fact.

3) As to the delay of seven months in accusing the defendant, it is clear that the 6th amendment applies only after indictment and that the applicable Statute of Limitations is intended as a safeguard. (United States v Marion, 404 U. S. 307). However, Marion also leaves room for situations in which a) actual prejudice to a defendant, or b) Intentional tactical delay by government officials, or c) harassment of the defendant can be shown. With those situations in mind, it would appear that a pre-trial hearing as to those issues should be had. To expect an accused and/or his witnesses to recall

their whereabouts some seven months previous at a particular time is most unreasonable and can result only in prejudice to the defendant. True, that if he is guilty he will be reminded by the testimony as the where he was. But if he was at the movies, or just walking, common sense defies recollection seven months previous. It is respectfully submitted that at the very least, the issue of intentional delay by the government should be explored prior to trial. To wait until the trial may well result in a situation where the jury may hear material it should not hear and/or the accused be put to a choice between two unattractive alternatives.

4) Resolved by conference.

5) and 6) Brady v Maryland, 373 U. S. 73 says, "We now hold that the suppression by the prosecution of evidence favorable to an accused UPON REQUEST violates due process...". The language and intent of the Court seems to clearly indicate that fair play requires that when the prosecutor is aware of exculpatory material he must immediately disclose it to the accused. Again, a trial is not a sporting event. It is not a personal contest as to who is a better attorney. It is a very serious business that means the elimination of meaningful time from the very life of a person. To speak of having a right to exculpatory material only at trial does not make sense in a civilized nation. An accused must be able, if appropriate, to investigate the significance of the material so that it may be properly utilized. There is no valid reason to withhold the material until trial or the eve of trial. If it exists, I want to use it and I want time to make intelligent use of it.

7) and 8) As to electronic eavesdropping, the government has asserted that there has been none as to the defendant or his counsel. The government has a duty to explore all reasonable law enforcement sources to discover not only intentional eavesdropping, but also unintentional overhearing---- particularly of counsel herein. Among my clients are a number of so-called Black Liberation Army members. I have reason to believe that either my own telephones were the subject of eavesdropping or that I have in fact been overheard on other telephones that were under surveillance, either lawful or unlawful. I have so informed the Assistant United States Attorney. I know, for example, that I have been overheard speaking on 212-857-9135 in the

Spring of this year, that telephone having been the subject of a Court-ordered wiretap. To simply state that there has been no electronic eavesdropping in any form utilized in this case does not fulfil the obligation of the government in this regard.

9) Since I represent the defendant, and not the government herein, I am not privy to the nature of the case against the defendant. I do not know what, if any, identification problems exist in this case. I do know that some eight months passed between the alleged incident, which the defendant totally denies, and the arrest. And I do know that such delay often is an accurate index to identification problems. Therefore, I am inquiring into the nature of any and all identification procedures so that I may intelligently challenge any courtroom identification thatmay have been tainted by any prior action by the government. The fact is that I do not now know anything at all about the case except what I have seen in the complaint and indictment, so that it is impossible for me to be more specific.

10) Again, not knowing the details of the case, I move to suppress certain kinds of evidence. Such motion may be premature, but I do not wish to find myself precluded for having failed to move within the appropriate period for the relief requested.

WHEREFORE, your affiant requests the relief sought in the Notice of Motion.

New York, New York
October 1, 1973

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people, black people, Hispanic people and poor people. The sole support for the claim is said to be "common experience" of unnamed persons known by defense counsel.

Grand jurors are selected in this district from the list of registered voters in Presidential elections. The propriety of utilizing voting lists as the selection process for grand jurors has long been established. United States v. Kelly, 349 F. 2d 720, 777-79 (2d Cir. 1965). Recent attacks upon this district's selection procedures based upon claims similar to those made by defendant here have met with no success. United States v. Guzman, 468 F. 2d 1245 (2d Cir. 1972), aff'g., 337 F. Supp. 140 (S.D.N.Y. 1972); United States v. Deardorff, 343 F. Supp 1033 (S.D.N.Y. 1971); United States v. Leonette, 291 F. Supp. 461 (S.D.N.Y. 1968). In the face of these decisions, defense counsel's mere conjecture that the grand jury selection procedure discriminates against such groups of people does not warrant an evidentiary hearing, let alone dismissal of the indictment.

C. MOTION TO DISMISS FOR ALLEGED PREJUDICIAL PRE-INDICTMENT DELAY

Defendant moves for a dismissal of the indictment, or for an evidentiary hearing, arguing that he was irreparably

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prejudiced by the almost seven month delay between the date of offense and the date of the criminal complaint in this matter. That defendant does not even bother to explain how he has been irreparably prejudiced speaks for itself. His counsel merely speculates that recollections may be impaired by the running of that time period.

The Supreme Court has held that neither the Sixth Amendment right to a Speedy Trial nor Rule 48(b), Fed. R. Crim. P., are applicable to pre-indictment delay. United States v. Marion, 404 U.S. 307 (1971) The Court in Marion held that, in cases of pre-indictment delay, the Due Process Clause of the Fifth Amendment may require dismissal of an indictment should events at the trial demonstrate actual prejudice to the defendant. See id at 326.

Decisions in this Circuit have likewise required defendants to demonstrate actual prejudice from any delay before consideration will be given to dismissal of an indictment. United States v. DeMasi, 445 F. 2d 251 (2d Cir.) cert. denied, 404 U.S. 882 (1971); United States v. Parrott, 425 F. 2d 972 (2d Cir. 1971); United States v. Capaldo, 402 F. 2d 821 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969);

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United States v. Feinberg, 383 F. 2d 60 (2d Cir. 1967), cert. denied, 389 U.S. 1044 (1968). In this regard, the above cases make it quite clear that it is not sufficient for a defendant simply to assert that he has been prejudiced. He must substantiate that assertion. Defendant clearly has not done so in this case. Moreover, as the Supreme Court's decision in Marion suggests, the proper time for a court to determine if any pre-indictment delay has sufficiently prejudiced defendant so as to deprive him of a fair trial is at the trial itself.

CONCLUSION

The Government respectfully submits that defendant's motions, except as consented to by the Government, should be denied.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States of America

JAMES E. NESLAND
Assistant United States Attorney
Of Counsel

DEFENDANT'S MOTION OF
MARCH 13, 1974

A17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

LUIS OTERO,
Defendant

NOTICE OF MOTION

73 Cr. 744 MEF

SIR:

PLEASE TAKE NOTICE that the undersigned, upon all the papers and proceedings heretofore had herein, will move this Court on the day of March, 1974, at a time and place convenient to the Court if the Court wishes to hear argument of counsel, for an order:

1) Dismissing the indictment on the ground that pre-indictment delay has prejudiced the accused in his ability to prepare a defense.

2) Directing the Government to return an automobile, a 1970 Gold-colored Cadillac, to the defendant, as consented to by the Government, in proper working order as it was at the time of seizure, without expense to the defendant.

3)(If the Court does not dismiss the indictment on the ground of pre-indictment delay or for any other reason), authorizing that the minutes of the first trial be provided without cost to the defendant for use at any subsequent proceeding.,

and for such further relief as may seem appropriate.

Yours, etc.

Dated: New York, New York
March 13, 1974

ROBERT BLOOM
Attorney for Defendant
350 Broadway
New York, New York 10013

212-233-3300

To: Paul Curran
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LUIS OTERO,
Defendant

ROBERT BLOOM, being duly sworn, deposes and says:

I am the attorney for the defendant herein. I was the attorney representing the defendant in the trial of this matter which ended in a mistrial March 4th of this year. I make this affidavit in support of the attached Notice of Motion.

1) As to the motion to dismiss for prejudicial pre-indictment delay, the incident occurred, according to the trial testimony of Government witnesses, November 28, 1972. There was an effort to make a "second buy" from the defendant February 21, 1973, which effort failed. Assuming the truth of these assertions, virtually nothing was done for four months to further "set up" the accused, nor to arrest him. Finally in June of 1973, the agent secured a complaint. Five weeks later, the defendant was arrested, in July of 1973, some eight months after the alleged incident.

Because of the nature of the defendant's employment in November, 1973, there are neither records to show his whereabouts at the critical time and date, nor, more significantly, can the accused nor anyone who might be of assistance recall the specific time and date.

It is certainly not unreasonable that one cannot remember a particular date eight months previous, especially when there is no noteworthy event upon which to recall.

United States v Marion, 404 U.S. 307 tells us that the accused must show actual prejudice at trial to be entitled to a dismissal for pre-indictment delay. In this Circuit, the various cases, in applying that rule, have not found actual prejudice but each of those cases is clearly distinguishable from the instant case.

In United States v DiMasi, 445 F. 2nd 251 (1971), the Court held that no prejudice had been shown by the accused in that there was no showing of any inability of witnesses to recall events. The instant case is just the

opposite. The defendant testified that he could not recall events on the critical day. It is noteworthy that the witness Torres, the informant, was also unable to recall events of that day which were not recorded in 3500 material which was available to him to refresh his recollection. Further, in the DiMasi case, the Court indicates that there was a legitimate reason for the delay there in that the Federal authorities were not involved until some time had passed. And the Court there also cited the need for careful investigation to protect the innocent from being wrongfully accused. According to the Government testimony and theory, neither of those considerations was a factor here. The delay was not justified nor was it explained.

United States v. Parrott, 425 F. 2nd 972 (1970), and United States v Feinberg, 383 F. 2nd 60(1967) are much the same as DiMasi. But United States v Capaldo, 402 F. 2nd 821 (1968) is most instructive for us. In Capaldo, the Court found that the accused was "able to give a coherent account of his version of the events on the day of the robbery", which, of course, is totally at odds with the instant situation. Otero could not recall where he was specifically and, of course, denied participating in the subject narcotic sale.

In Capaldo, the accused had been interviewed concerning the crime shortly after it was committed and "thus was able to fix the day in his mind." In our case, Otero had no notice whatsoever until eight months after November 28, 1972 that his whereabouts on that day were to be the subject of inquiry.

It is respectfully submitted that the instant case is the very fact pattern contemplated by the rule. It is not a question of actual length of delay, it being true that other cases where no prejudice was found involved longer delays than eight months, but rather a question of actual prejudice to an accused.

2) At arrest, defendant's automobile was seized. After some months, the Government agreed to return the car. When the car was first seized it was in perfect condition. I am informed by agent Gray that after it was held in the custody of the Government, it required nearly two-hundred dollars worth of repairs. I do not know what caused the damage,

unless it was used by the agents or subjected to some other abuse. In any event, I am informed by agent Gray that it can only be returned upon the payment of repair costs. I respectfully request that this Court direct the Government to relinquish the car without the accused having to pay for repairs.

3) The accused has spent a good deal of his money, including savings, on counsel fees and other expenses related to this case. As a result, he is unable to afford to purchase the minutes of the first trial for use at a second trial, (assuming the Court does not see fit to grant the motion to dismiss for pre-indictment delay). If the Court preliminarily approves, the appropriate forms will be submitted showing indigency and need.

WHEREFORE, your deponent respectfully prays for the relief sought.

Robert Blum

Sworn to before me this
14th day of March, 1974.

Irene B. Parker

IRENE B. PARKER
Notary Public, State of New York
No. 41-3017500
Qualified in Queens County
Term Expires March 30, 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

LUIS OTERO,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 20th *day of* Feb. *19*75 *at*

deponent served the annexed Brief and Appendix for Appellant *upon* Paul J. Currant , U.S. Attorney, Fed. Courthouse, Foley Sq., N.Y.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 20th *day of* February *19*75

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418956
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975